THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT 06-S-318 to 321

STATE OF NEW HAMPSHIRE

V.

WILLIAM WOOD

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

LYNN, C.J.

The defendant, William Wood, is charged with two (2) counts of possession of a controlled drug with intent to sell and two (2) counts of possession of a controlled drug. Presently before the court is the defendant's motion to suppress evidence obtained from the search and seizure which forms the basis for the charges. I conclude that the motion must be granted.

I.

Based on the evidence presented at the hearing held on September 26, 2006, I find the pertinent facts to be as follows. On December 31, 2005, Sergeant Bryan Marshall of the Nashua Police Department was on patrol in a marked police cruiser. At approximately 12:18 a.m., he entered the parking lot of the Motel 6 on Main Dunstable Road in Nashua, New Hampshire to conduct routine patrol of the area. Sergeant Marshall testified that the Motel 6 area is known for problems with transients and drug trafficking and that he had previously conducted drug raids at the motel. Marshall drove into the parking lot and looped around behind the main building of the motel. As he was driving behind the main building, he observed a 1996 black Lincoln Continental parked

next to a dumpster. The vehicle was parked half on the grass and half on the pavement in a non-designated parking area. The vehicle appeared to be running. As Marshall approached, he observed a male seated in the front passenger seat of the Lincoln and a second male, later identified as the defendant, who was in the process of exiting the driver's side door.

The defendant walked around the vehicle and across the parking lot in front of Marshall's police cruiser. Marshall estimated that at the time the defendant crossed in front of him, he was approximately 20 feet from the cruiser and that the defendant looked directly at the officer. The defendant continued toward the motel and began to ascend the staircase located on the south side of the motel. As Marshall passed the staircase in his police cruiser, he could only see the defendant from his torso down because, given the height to which the defendant had climbed, the officer's vision was obscured by the inside of the cruiser. At approximately the point where Marshall drove by the defendant, he saw the defendant hesitate in his ascent of the stairs, momentarily turn and take a step down the stairs, and then turn again and continue up the stairs. Marshall then lost sight of the defendant as he (the officer) continued to move forward through the parking lot.

Having made note of the license plate number of the Lincoln, Marshall ran a check and determined that the vehicle was registered to William Wood. Marshall recognized the name and address provided for Wood as being consistent with a person who was known to be involved in the drug trade. The physical description of Wood provided through the check matched that of the person Marshall had just observed crossing in front of him and climbing the stairs.

In addition to checking the license plate of the Lincoln, Marshall also queried the "IMC screen" of his in-cruiser computer. The IMC screen allows an officer in the field to obtain a listing of all contacts which the Nashua Police Department has had with a particular individual. Through the IMC check, Marshall received the following information: (1) on December 20, 2005 the defendant was the victim of a drug overdose; (2) in October of 2005 the defendant was the subject of a field interview concerning suspected drug activity; (3) in May of 2005 the defendant was listed as suspected of possessing drugs; and (4) in April of 2005 the defendant was listed as a person connected to multiple drug sales. Marshall also remembered that, at some point during a roll call in 2004, it was reported that the defendant had had problems with another drug dealer and had armed himself with a firearm for self-protection.

On the basis of the foregoing facts and circumstances, Sergeant Marshall determined to initiate an investigative stop of the defendant's vehicle if it exited the motel parking lot within a reasonable amount of time. Thereupon, Marshall radioed for back-up and spoke to Lieutenant Bukunt about what he had observed. Upon learning the identity of the subject, Bukunt told Marshall that he was very familiar with the defendant and that the defendant was a known drug dealer. While Marshall was talking with Bukunt, he drove to a small parking lot west of the motel on Main Dunstable Road.

Approximately twelve minutes later, at 12:30 a.m., Marshall observed the Lincoln exit the motel parking lot and turn on to Main Dunstable Road. As the Lincoln passed in front of Marshall, the officer pulled out behind it and initiated a traffic stop by activating his blue lights, flashing headlights, and spotlight. Although the Lincoln promptly pulled to the right side of the road, it did not immediately come to a stop. Instead, it continued

rolling along the side of the roadway for approximately twenty yards before finally stopping.

Sergeant Marshall exited his police cruiser and approached the driver's side of the Lincoln. He observed the defendant in the driver's seat. At this point, Lieutenant Bukunt arrived and approached the passenger side of the vehicle. For safety purposes, Marshall asked the defendant to exit the vehicle. The defendant complied and Sergeant Marshall escorted the defendant to the front of the Lincoln. At the same time, Bukunt asked the passenger to exit the vehicle and escorted him to the rear of the Lincoln.

Marshall asked the defendant if he had any weapons on him. The defendant did not respond. Marshall then initiated a pat search of the defendant. During the pat search, Marshall noticed that the defendant's pants pockets were full and he felt hard and pointy objects in these pockets. Marshall could not identify the objects with certainty, but he thought that one might be a key chain and that another could be a pocket knife attached to the key chain. Marshall asked the defendant what was in his pockets; the defendant did not reply. Marshall then reached into one of the defendant's pants pockets and removed the entire contents of the pocket in order ascertain whether the defendant had any weapons. The items removed from the pocket included keys, cash and several Bic lighters. Marshall placed these items on the hood of the Lincoln.

Marshall next patted down the defendant's waistline under his belt, but did not find anything in this area. The officer then checked the left front pocket of the defendant's jacket and felt at least two long, hard objects and several small, firm objects. Marshall again asked the defendant what was in this pocket and the defendant did not respond. Marshall then reached into the pocket and removed all of the objects.

He found a small pill bottle, a flashlight, a glass tube wrapped in a paper towel, and a small plastic baggie containing vegetative matter which the officer recognized to be marijuana. At this time, Marshall arrested the defendant for possession of marijuana and immediately turned his custody over to Officer Phil Nichols, who had just arrived at the scene.

Subsequently, Sergeant Marshall walked to the driver's side door of the Lincoln in order to perform an inventory search of the vehicle pursuant to the Nashua Police Department's Standard Operating Policy. Marshall illuminated the inside of the driver's compartment with his flashlight. As he illuminated the floor of the driver's side area, Marshall observed a v-shaped piece of a plastic bag, with a powdery residue on the plastic, protruding from the bottom of the center console that separates the front seats. Immediately recognizing the likely contents of the bag as drugs, Marshall opened the driver's side door and pulled the plastic bag out. When he did so, two other bags containing a white, chalky, powdery substance fell on to the driver's side floor. At this point, Marshall stopped the inventory search and decided to obtain a search warrant.

Shortly thereafter, the vehicle was towed to the Nashua Police Department. Sergeant Scott Hammond later obtained a search warrant for the vehicle, execution of which yielded additional contraband.

II.

The defendant argues that, pursuant to the State and Federal Constitutions, the drugs seized by Sergeant Marshall must be suppressed because: (1) Marshall lacked reasonable suspicion to initiate a stop of the defendant's vehicle; (2) Marshall exceeded the permissible scope of an investigatory stop; (3) the initial warrantless search of the

vehicle was unlawful; and (4) the items seized pursuant to the search warrant are fruits of the illegal stop and search. Because the New Hampshire Constitution provides at least as much protection of individual rights in these areas as does the United States Constitution, I decide this case based on state constitutional principles and reference federal case law only for guidance in deciding the state issues. See State v. Roach, 141 N.H. 64, 65 (1996) (citations omitted); State v. Ball, 124 N.H. 226, 231-32 (1983). Further, inasmuch as I find that the initial stop of the defendant's vehicle was not supported by reasonable suspicion, it is unnecessary for me to address defendant's remaining arguments.

The New Hampshire Supreme Court has followed the lead of the United States Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), by recognizing that an investigative stop is a very limited seizure that is permissible under the New Hampshire Constitution. See State v. Brodeur, 126 N.H. 411, 415 (1985). In order "[t]o undertake an investigatory stop, a police officer must have reasonable suspicion, based upon specific, articulable facts taken together with rational inferences from those facts, that the particular person stopped has been, is, or is about to be engaged in criminal activity." State v. Wiggin, 151 N.H. 305, 308 (2004) (citations omitted). "The factual basis supporting the stop must exist at the time the defendant is, for constitutional purposes, seized." State v. Wallace, 146 N.H. 146, 148 (2001) (citation omitted). "To determine the sufficiency of [an] officer['s] suspicion, [the court] [] consider[s] the facts [] articulated, not in isolation, but in light of all the surrounding circumstances, keeping in mind, in particular, that a trained officer may make inferences and draw conclusions from conduct that may seem unremarkable to an untrained observer." State v. Pellicci, 133 N.H. 523, 530 (1990) (quotations and citations

omitted). Nonetheless, "[a] reasonable suspicion must be more than a hunch." State v. McKinnon-Andrews, 151 N.H. 19, 26 (2004) (citation omitted); see also Illinois v. Wardlow, 528 U.S. 119, 123-24 (2000) (citation omitted). "The suspect's conduct and other specific facts must create a significant possibility of criminality; the facts must lead somewhere specific, not just to a general sense that this is probably a bad person who may have committed some kind of crime." State v. Vadnais, 141 N.H. 68, 70 (1996) (quotation and citation omitted).

In arguing that Sergeant Marshall possessed reasonable suspicion to stop the defendant's vehicle, the State relies primarily upon the following three factors: (1) the defendant's pedigree as a "known drug dealer;" (2) Motel 6 and its environs' reputation as a "known drug area;" and (3) the specific observations of the conduct of the defendant made by Marshall during his encounter with the defendant on the night in question. The State asserts that, taken in combination, these factors reasonably supported Marshall's conclusion that the defendant had been, was, or was about to engage in the unlawful possession or distribution of drugs. I am not persuaded.

Dealing first with the character of the neighborhood, I find that that the State has failed to demonstrate that the Motel 6 area was, in fact, an area known for problems with drug activity at or around the time of the stop at issue. On direct examination, Sergeant Marshall testified generally that he was familiar with the Motel 6 area based on his twenty years as a Nashua Police Officer; that it was a high crime area; and that he had conducted drug raids at the motel in the past. However, when pressed on cross examination, he could provide little in the way of details to support the thesis that the motel had been the situs of drug activity reasonably close in time to December 31, 2005. For example,

Marshall said he could not recall personally making any arrests at the motel over the previous year. He also indicated that he could recall only one arrest made by other officers at the motel within the previous year, and he was not certain that this arrest involved drugs. Further, Marshall could provide no information as to how many search warrants had been executed at the motel in the two years prior to the incident at issue in this case. Beyond Marshall's testimony, the State did not introduce any other evidence concerning the character of the area where the motel is located. Given the police department's highly sophisticated record keeping system, it presumably could have presented the court with detailed records concerning specific search warrants executed, arrests made, or drug raids conducted in and around the neighborhood of the motel.[1] In the absence of more detailed evidence concerning the neighborhood, I find the State has not met its burden of establishing that Marshall's belief the Motel 6 area was known for drug activity around the time of the stop was objectively reasonable.[2]

Turning to the pedigree of the defendant, I have no difficulty in finding that the State presented sufficient evidence to demonstrate that Marshall could reasonably believe the defendant had a lengthy history of involvement with illegal drugs. However, the mere fact that the officers knew the defendant to be involved with drugs does not justify the stop. "Knowledge of a person's prior criminal involvement is not, standing alone, sufficient to create reasonable suspicion." United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996)

[1] I should not be understood as intimating that the State has an obligation to produce such records as a routine matter in these types of cases. Rather, my point is simply that where, as here, the officer who made the stop is unable to articulate sufficient specific information to establish an objective basis for his assessment of the character of the neighborhood, evidence of the kind described in the text may assist the State in meeting its burden.

[2] It is important to emphasize that my ruling on this point is not based on a determination that Sergeant Marshall lacked credibility. Quite the contrary, I found Marshall to be a very credible witness. However, his candid acknowledgments of a lack of specific information concerning recent drug activity in the Motel 6 area does undermine the strength of the "character-of-the-neighborhood" factor as support for finding reasonable, articulable suspicion for the stop. In sum, as stated in the text, my finding is based on the State's failure to meet its burden of proof, not upon the credibility of Sergeant Marshall.

(citation omitted). The inference that because the defendant is a known drug dealer he is engaged in drug trafficking at any particular time "is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." Sibron v. New York, 392 U.S. 40, 62 (1968) (mere fact that defendant was talking with narcotics addicts did not support inference he was involved in drug activity).

The question then becomes whether the particular observations of the defendant's conduct, made by Marshall on the night in question, when combined with the officer's knowledge of the defendant's history of drug activity, provide a sufficient basis for Marshall to reasonably conclude criminal activity was afoot. I hold they do not.

The facts that the defendant briefly parked in a non-designated parking area and that he left the motor of the vehicle running while he went upstairs to the motel provides little support for the inference that the defendant was engaged in criminal activity. While this conduct might be consistent with a drug dealer making a quick pick up or drop off of contraband, there are numerous other equally plausible and entirely innocent explanations for such behavior. For example, given the time of year, it would seem reasonable for a person to leave his vehicle running in order that the passenger could stay warm while the operator made a brief stop to speak with an acquaintance who was staying at the motel.

I also reject the suggestion that the defendant's hesitation and "back step" on the stairs as Marshall drove by him supports an inference of criminal activity. The State attempts to analogize this behavior to the conduct at issue in Roach, but the analogy fails. In Roach, the defendant was observed "poking his head and body out of an alley in an area of the city known for drug activity" at 3:55 a.m. 141 N.H. at 65. The officer

observed the defendant continue this behavior for a minute and then saw him walk to the street corner and return to the alley. Id. "The defendant appeared nervous even from a distance." Id. The defendant then began to walk toward the corner and the officer drove in his direction, at which time, "the defendant quickly reversed direction." Id.

The behavior at issue here bears no resemblance to the clearly furtive activity observed by the officer in Roach. Sergeant Marshall testified that, as the defendant walked in front of his police cruiser, the defendant turned and looked directly at him. Unlike in Roach, there is no indication that, upon seeing the clearly marked police cruiser, the defendant acted evasive or nervous, or attempted to hide anything. Furthermore, in light of Marshall's testimony that he drove his cruiser past the staircase very slowly, it seems to me the most reasonable inference to be drawn from the momentary hesitation which Marshall observed was that the person climbing the stairs may have believed the officer was about to stop and wanted to speak with him, and he therefore had begun to turn around to meet the officer -- until he saw the officer drive away. Whatever the explanation for defendant's hesitation on the stairs, the important point is that, unlike the conduct in Roach, the conduct here simply cannot be construed as evasive or indicative of a desire by the defendant to avoid contact with law enforcement. [3]

[3] Arguably, Sergeant Marshall's testimony that the defendant did not stop immediately but instead drove along the side of the road for a longer than normal period after the officer activated his emergency lights, constitutes some evidence that could support an inference of a desire by the defendant to avoid contact with the police. Under federal law, this evidence could be considered in determining whether there was reasonable suspicion for the stop, since, until the defendant submitted to the stop by bringing his vehicle to a halt, no "seizure" for Fourth Amendment purposes would have occurred. See California v. Hodari D., 499 U.S. 621 (1991). However, under state law, seizure of the defendant is deemed to have occurred when Marshall signaled the defendant to pull over by activating the cruiser's emergency lights, since by so doing the officer made a show of authority sufficient to indicate to a reasonable person that compliance with the signal was mandatory. See State v. McKinnon-Andrews, 151 N.H. at 22

III.

For the reasons stated above, the defendant's motion to suppress is hereby granted.

BY THE COURT:

October 23, 2006

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ROBERT J. LYNN
Chief Justice

("In this case, the officer seized the defendant when he pulled the defendant's car over for a traffic violation."); accord. State v. McKeown, 151 N.H. 95, 97-98 (2004) (marine patrol officer's actions in coming directly toward defendant's kayak in a marked patrol boat, holding up a flotation device when he was 50 feet away from the kayak, and asking the defendant if he had a similar device, constituted a seizure); State v. Quezada, 141 N.H. 258, 260 (1996) (conduct of officer in shouting "Hey, you, stop" indicated that compliance was not optional). That being the case, the defendant's delay in bringing his vehicle to a halt cannot be considered in evaluating the legality of the seizure which had already occurred. State v. Beauchesne, 151 N.H. 803, 815 (2005).